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No. 798

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

THE DENVER UNION STOCK YARD COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA AND SECRETARY OF AGRICULTURE,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

REPLY BRIEF OF APPELLANT

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ARGUMENT.

Counsel for defendants have discussed the questions presented in this case in slightly different order from that in which they are presented in appellant's brief. Accordingly, the following table may be of assistance to the Court:

Defendants' Brief Sec.	Page	Subject	*Appellant's Brief* Sec.	Page
I A	18	Exclusion of Trackage and Loading and Unloading Facilities	III	55
I B	34	Exclusion of Stock Show Property	II	31
II	57	Going Concern Value	I	12
III	83	Charge to Yard Traders	IV	67
IV	100	Land Valuation	VII	93
V-A	109	Exclusion of Dues, Donations and Subscription Expense	V	85
V-B	112	Exclusion of Expenses of Pending Rate Hearing	VI	89
VI	115	Rate of Return	VIII	96

In this reply brief we will discuss the matters in the order adopted by counsel for defendants.

Before doing so, however, we note the statement of Government counsel that the brief of appellant does not discuss the scope of the review in this case. We did not believe it necessary. This is a case charging that the rate order is confiscatory and deprives appellant of its property without due process of law contrary to the Fifth Amendment to the Constitution. It is a settled rule, therefore, that the Court must and will reach its independent judgment on both the law and the facts, to determine whether or not constitutional rights have been infringed.

The latest expression of this rule, and the extent to which the Court will go, is contained in *St. Joseph Stock Yards Company v. United States,* 298 U. S. 38, 50-54. It is there pointed out that the fixing of rates is a legislative act and that in determining the scope of judicial review of that act, there is a distinction

between acts within the sphere of legislative authority and acts which transcend the limits of legislative power. So long as the legislative branch acts within its proper sphere, the Court does not sit as a board of revision to substitute its judgment for that of the legislature or its agents as to matters within that sphere. A different situation exists, however, when invasion of constitutional rights is alleged. We quote from pages 51 and 52 of the opinion: (italics ours).

> But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the Legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The Legislature cannot preclude that scrutiny or determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. *Nor can the Legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation.* . . . . . It is said that we can retain judicial authority to examine the *weight of evidence* when the question concerns the right of personal liberty. But, if this be so, it is not because we are privileged to perform our judicial duty in that case and for

> reasons of convenience to disregard it in others. *The principle applies when rights either of person or of property are protected by constitutional restrictions.*

The principle is also well stated in *The Denver Union Stock Yard Company v. United States,* 57 Fed. (2d) 735, 739:

> (b) Or an order may be attacked upon the ground that it deprives the petitioner of its property without due process of law. When the attack is made upon constitutional grounds, a court is required to exercise its independent judgment as to both law and facts . . . . .
>
> Constitutional rights may be as successfully and as seriously invaded by mistakes of fact as by mistakes of law. When a citizen asserts that the rights guaranteed him by the Constitution have been invaded, the responsibility rests upon the courts to hear him, and he cannot be denied a hearing on the ground that his claim rests upon a question of fact. Where such a claim is made, the petitioner is entitled to present all of the material facts . . . . .

Appellant charges in this case, confiscation arising both from mistakes of law and mistakes of fact on the part of the trial Court as well as on the part of the Secretary. As stated in our first brief, appellant's case stands or falls upon the proposition that the findings of fact and conclusions of law based thereon, are either contrary to the evidence of record or not supported by substantial evidence of record. We submit, therefore, that the scope of review includes not only

an examination of that evidence, but a proper weighing thereof in accordance with the principle so clearly stated in the *St. Joseph Stock Yards* case, *supra.*

We pass now to the direct answer to the brief of defendants.

I.

EXCLUSIONS OF PROPERTY.

Under this heading, commencing with page 18 of their brief, counsel for defendants deal with the subject matter of points I and II of appellant (brief of appellant, pp. 31 - 66 inc.), namely, the exclusion from the rate base of the value of the loading and unloading facilities, including trackage, and the exclusion of the Stock Show properties. The Government denies appellant's contentions and asserts that these properties are properly excluded.

At the outset of their argument, Goverment counsel assume the point at issue. They say that the Secretary found these properties to be not-used and not-useful in the rendition of stockyard services and that "the value of this not used and useful land and of these not used and useful structures could not, *therefore,* be included in the rate base." Four cases are cited, on page 18 of defendants' brief, which, so far as material here, go to the point that *if* property is *in fact* not used and not useful, its value is to be excluded from the rate base. We agree. The question at issue here, however, is the validity of the Secretary's findings in this regard. Appellant asserts that these properties are not only used and useful in the rendition of stockyard services but also are an integral part of

the plant and equipment of appellant, all of which for almost 17 years has continuously been posted by the Secretary as a public stockyard within the meaning of the Packers and Stockyards Act, 1921. (Government Exhibit 1).

A. Trackage, loading and unloading facilities, and the so-called chute alleys.

There is no question about the used and useful nature of these facilities. Government witness Christensen (R 390) testified on this point as follows:

> The Stock Yard Company owns these railroad tracks and other improvements which are necessary to their operations adjacent to the stockyards and other industries within the city of Denver. The Stock Yard Company does not own any locomotives, cars or other railroad equipment . . . . .
>
> Transportation facilities comprise two classes, viz:
>
> A—Those referred to in Volume 1 as Class A facilities, which are used and reasonably necessary in that course of commerce whereby livestock and feed and material incidental to the conduct and operation of the stockyards, move to or from the stockyards; . . . . . The trackage and loading and unloading facilities are all listed by the witness in Class A.

We take issue with the statement of counsel on page 19 of the brief of defendants to the effect that these facilities "are not employed in the rendition of stockyard services." § 302 of the Packers and Stockyards

Act, 1921 (U.S.C.A. Title 7, Sec. 202, Appendix to brief of appellant p. 103) reads: (italics ours)

> *"Stockyard" defined; determination by Secretary as to particular yard.* (a) When used in sections 201 to 217, inclusive, of this chapter the term "stockyard" means *any place*, establishment, or facility *commonly known as stockyards, conducted or operated for compensation or profit as a public market*, consisting of *pens*, or other inclosures, *and their appurtenances*, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. Sections 201 to 217 inclusive of this chapter shall not apply to a stockyard of which the area normally available for handling livestock, exclusive of runs, alleys, or passage ways, is less than twenty thousand square feet.

The pens are definitely within the definition and we submit that the docks and chutes are "appurtenances" to every pen and enclosure in the stockyard area.

§ 301 (b) (U.S.C.A. Title 7, Sec. 201 (b) appendix p. 102) defining "stockyard services" reads as follows (italics ours):

> (b) The term "stockyard services" means services or *facilities furnished at a stockyard* in connection with the *receiving*, buying or selling on a commission basis or otherwise, *marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock;*

This definition fits each and every one of these excluded properties—trackage, docks, chutes, pens and alleys, whether the livestock stops for sale or merely for feed, water and rest under the 28 hour law.

The question, therefore, is similar to that involved in *St. Louis & O'Fallon Ry. Co. v. United States,* 279 U. S. 461, as recently pointed out by this Court.* The question concerns the command of Congress addressed to the Secretary of Agriculture in relation to its valuations of stockyard property.

> In St. Louis & O'Fallon Railway Co. v. United States, 279 U. S. 461, 49 S. Ct. 384, 73 L. Ed. 798, the Court was not dealing with the order of a state commission, or with a question of due process, but with the command of Congress addressed to the Interstate Commerce Commission in relation to its valuations of railway property. The Court construed that command and found that it had not been obeyed.

If by command of Congress, these facilities are stockyard facilities, their value must be included in the rate base in order that the Secretary may establish rates which will yield a fair and reasonable return upon the property devoted to the public service, unless there is some other provision in the Packers and Stockyards Act, 1921, requiring a different result.

The Government says there is this additional provision. The argument is that by Section 406 (U.S.C.A. Title 7 §226, appendix to brief of appellant p. 106) the Secretary of Agriculture is prohibited from interfering

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* Railroad Commission v. Pacific Gas & Electric Co. 302 U. S ....., 58 S. Ct. 334 at 341:

with the power of the Interstate Commerce Commission or from having concurrent power or jurisdiction over any matter within the power or jurisdiction of the Commission. Counsel then say that these facilities are all used in the transportation of livestock, that transportation by rail is under the jurisdiction of the Interstate Commerce Commission, and therefore, that these facilities are under the jurisdiction of that Commission. Hence, counsel argue, the Secretary has no jurisdiction over these facilities used in the transportation of livestock and cannot include the value of these properties in the rate base.

If true, the argument is not sound. It is based primarily upon Section 15 (5) of the Interstate Commerce Act. Because we shall shortly demonstrate the pertinency of the exceptions named therein to the facts of this case, a portion of that section is italicized. Section 15 (5) of the Interstate Commerce Act, as amended in 1920, reads in part as follows: (italics ours)

> Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee, or owner, *except in cases where the unloading or reloading en route is at the request of the shipper, consignee, or owner, or to try an intermediate market, or to comply with quarantine regulations.*

That section requires the carriers to own or provide suitable means for the loading and unloading of livestock into cars or pens, and specifies when the cost of such service shall and shall not be included in the line-haul rate and absorbed by the carriers. It does not attempt to affect the title or ownership of those facilities. If the facility is owned by the Yard Company and used and useful in the receiving, handling and shipment of livestock in commerce (Sec. 201 (b) of the Packers and Stockyards Act, 1921, *supra* p. 7), it remains and is a stockyard facility.

We grant for purposes of argument that the Commission has jurisdiction under Section 15 (5) of the Transportation Act, of the amounts which a carrier can pay the Stock Yard Company for providing these necessary facilities. That is not decisive of the question. Neither this Court nor the Commission has held that the Commission has a right to require a stockyard to lease its facilities to the railroads except in the case of the Chicago Stockyards which, as a prerequisite to such finding, was held to be a common carrier. *United States v. Union Stockyard Co.* 226 U. S. 286, 306, *Atchison, Topeka & Santa Fe RR. Co. v. United States,* 295 U. S. 193. The opposite result has been recognized where the stockyard was not a common carrier. *Atchison, Topeka & Santa Fe Ry. Co. v. Kansas City Stock Yards Co.,* 33 I.C.C. 92, wherein the Commission cancelled, at the suit of the carriers, a tariff filed with the Commission by the stockyards company setting out these charges for loading and unloading livestock.

Nevertheless, let us assume that the Commission does have such power. The Interstate Commerce Act

and the Packers and Stockyards Act, 1921, did not give the Commission power and authority to require the stockyard company to provide these facilities at such rate as the Commission may fix. As a practical matter, it is essential for the stockyard company to get the livestock and hence, if we assume that the Commission can control the amount the carrier will pay, we can assume that the Yard Company not only will but must accept it whether or not it is a fair return upon the amount invested by it in those facilities. In valuing the properties, and putting that value into the Yard Company rate base in such case, the Secretary takes into the income account, the offsetting amount received from the carriers. If small, the shipper of livestock is not hurt, because he has had included in his freight rate less than the fair return. If large, there is less balance to be spread into stockyard rates. There is no "double impost." The jurisdiction of the Secretary does not overlap that of the Interstate Commerce Commission in any particular.

Denver Union Stock Yard Co. v. United States, 57 Fed. (2d) 735 at 749.

The cases cited by counsel for defendants do not militate against our position. We admit that under the Interstate Commerce Act, transportation does not cease until the livestock has been unloaded into suitable pens for delivery to the consignee. This is held by *Dimmitt-Caudle-Smith Livestock Commission Co. v. Chicago, Burlington & Quincy RR. Co.,* 47 I.C.C. 287, 318 and most of the other Interstate Commerce cases cited on page 27 of the brief of defendants. Involved in such cases, however, is the question of whether the

carrier could collect from the shipper or consignee a charge for such service, not whether the stockyard company could make such a charge to the carrier. In none of them was any jurisdiction over the Stock Yard Company assumed or exercised by the Commission.

In *Atchison, Topeka & Santa Fe Ry. Co. v. Kansas City Stock Yards Co.*, 33 I.C.C. 92 *supra*, one of the cases cited by opposing counsel on page 27 of their brief, the case as finally resolved by the Commission was that the Kansas City Stockyards was not a common carrier, hence its tariff filed with the Commission was ordered cancelled. The Commission found, however, that since the Yard Company permitted its rails to be used by any one having business at the yards, the usage was public transportation and hence the carrier could pay the Yard Company its demands for the use of the facilities without such payment constituting an unlawful rebate under the Interstate Commerce Act.

In *Strauss & Adler v. New York Central Railroad Company* 153 I.C.C. 609, the question presented was whether the railroad defendants could charge against the shipper or consignee, the service charges assessed by the stockyards at Pittsburgh and Buffalo. The case held that the carriers would have to absorb these charges. The yards themselves were found to be non-railroad-operated yards and there is nothing in the case which indicates any attempt on the part of the Commission to exercise jurisdiction over those two stockyards.

As stated above, the cases dealing with the Chicago stockyards are not in point in this controversy because The Union Stockyard & Transit Company of

Chicago, which is the corporate name of the Chicago Stockyards, both by virtue of its charter provisions and because of its actual railroad operation, or connection, has continuously been held to be a public carrier. Consequently, its repeated attempts to cancel its tariffs on file with the Commission have been defeated. See *Livestock Loaded and Unloaded at Chicago*, 218 I.C.C. 330. The basis for the holding that the Chicago Stockyards is a public carrier is well set out in *United States v. Union Stockyard Company*, 226 U.S. 286 at 306, where this Court points out that the joint operation of the Stockyard Company and the Junction Railways, and their common ownership by a holding company called The Junction Railways & Union Stockyards Company, makes the stockyard in that case a common carrier subject to the jurisdiction of the Interstate Commerce Commission.

The Commission has never claimed any such jurisdiction over appellant at Denver, which does not own and never has owned any motive power or rolling stock, has never held itself out to be engaged in common carriage, and is not under joint ownership or control with any other corporation whatsoever. The situation here is much more analagous to that at Kansas City as portrayed by *Atchison, Topeka & Santa Fe Ry. Co. v. Kansas City Stock Yards Co., supra.*

We admit, however, that the Kansas City case just mentioned, and reported in 33 I.C.C. 92, was decided before the adoption of Section 15 (5) of the Interstate Commerce Act. We do not believe that this makes any difference, however, since that section, properly viewed, is an enactment of the rule in *Cov-*

ington Stockyards Co. v. Keith, 139 U.S. 128, which antedates the Commission ruling at Kansas City.

All through the Government argument the statement is made that the railroads absorb these transportation charges. We pointed out in our first brief at page 63 that only about 20% of these charges are absorbed by the carriers at Denver (R 1046) due to the fact that Denver is a transit market and the bulk of these receipts are fat or feeder livestock which is sold under the transit arrangement, or after having stopped to try the market. This is a further reason why the Chicago cases are not in point because at Chicago, 100% of the transportation charges are absorbed by the railroads due to two factors,—first, that Chicago is, as one witness described it, "the end of the road," i.e. the last market to which cattle from this western country are shipped for sale, and second, it is a rate break point in railroad tariffs. Consequently, for either one or both of these reasons, livestock does not stop at Chicago to try the market and does not move out on through billing if sold in transit.

We quoted at page 9 of this brief, Section 15 (5) of the Interstate Commerce Act, italicizing a portion thereof, and stated that we would comment upon the exceptions named in that Act. The exceptions are that transportation charges are not absorbed in cases where the unloading or reloading enroute is at the request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations. Where livestock is stopped at Denver, sorted, sold and moved out on through billing, the railroad carriers, under the authority of the Interstate Commerce Commission, deems such stoppage to be "un-

loading or reloading enroute at the request of the shipper, consignee or owner" and consequently, all unloading and reloading charges and other transportation costs are added to the way-bill and collected from the shipper. Transactions of this sort, plus the stoppage of livestock to try the market as shown by the testimony, constitute 80% of the transactions at the Denver market.

Much of the Government argument is also directed to the statement that the question is academic and the note commencing at the bottom of page 20 of the brief of defendants purports to show an annual average rate of return from the so-called transportation facilities of 10.39%, which, if bedding sales are included, and therefore excluded from the income account, would increase this percentage to 12.94%. It is to be remembered that this computation of the Government is based upon the government valuation figures as to land and trackage. The railroads themselves, by contract, pay The Denver Union Stock Yard Company for the use of its spur or industry tracks on the basis of $8,772.00 per acre plus $30,000 allowance for actual expense in grading. They also pay one-half of the state and county taxes. This land valuation is greatly in excess of the Government figure for acreage in the same zones and incidentally points to and supports our contention in Part VII, commencing on page 93 of our first brief, that the land valuations of the Government are arbitrary and confiscatory and not grounded on substantial evidence. The arrangement with the railroads was the result of arms length bargaining.

Based upon the agreed valuation, we admit that the return is approximately 7% and to that extent only is the question academic. From a dollars and cents standpoint, it makes very little difference to us whether the railroad trackage, loading and unloading docks, chutes and chute pens are included or excluded. A matter of principle, however, is involved and when the Secretary extends his arbitrary action to exclude the value of alleys which are in general use (R 1170), though bordering the docks and chutes and chute pens, merely because a part of their use is in gaining access to and from the trackage and loading facilities, we maintain that the Secretary's action is arbitrary and cannot be sustained.

B. Exclusion of the stock show properties.

The admitted value thus excluded from appellant's rate base is $244,515.00 (brief of defendants, p. 34). The basis for exclusion is given in the paragraph in the middle of page 37 of defendants' brief, thus:

> It is manifest for two principal reasons that the Secretary was required under the Packers and Stockyards Act to exclude this property from the rate base: (1) the property is not used by appellant but by another corporation which is separate and distinct from appellant and which conducts an entirely different and separately managed business and (2) this property is not used to render stockyard service.

An analysis of this statement will show the misstatements, assumptions and misconception of the evidence of record with which this portion of the brief of defendants is replete, and will demonstrate the unsoundness of the Government's position. In the argument

which follows, the word "brief" refers to the brief of defendants herein, unless otherwise noted.

It is admitted that the Western Stock Show Association is "another corporation" but it is no more separate and distinct than is any controlled subsidiary or affiliate. At page 35 of the brief, counsel say:

> After attempting to operate the show appellant found the burden onerous and conceived the idea of promoting a new corporation to take over the work.

And again at page 37, counsel say that if the stock show had been an integral part of appellant's business, its operation would not have been "unloaded on a separate corporation."

The record does not justify these statements and their necessary implications. We refer the Court to the testimony of Mr. Pexton, commencing at the bottom of page 829 of the record (folio 1558) through page 843. The Government did not attempt to contradict or refute it. We quote a portion of that testimony:

> Thirty-five years ago, or about 1900, the type of cattle produced in the territory tributary to the Denver market was mediocre in quality and breeding. They were the Southern Longhorn type, which had been driven north largely from Texas as the country developed. They were hard to fatten, were not a desirable meat when fattened, were not good units of meat and did not give a good account of themselves, in ratio to the time and feed consumed, either on the range or in the feed lots. At that time

Colorado cattle were not known as being particularly good feeders and did not command a premium at Denver or other markets. This condition with regard to mediocre cattle was general in the territory tributary to Denver market at the time of which I have been speaking, namely 1900 and the early 1900's, and in my opinion resulted in penalizing the producer of those cattle as to price and outlet. As a result of this situation it was felt by the majority of the producers of the west and the owners of the Denver Stock Yard that much could be done to improve the type of cattle produced in Colorado and adjacent states, to advertise the better cattle that could be produced, to create a premium for them, and to enlarge the outlet on the Denver market. It was apparent that such action, with the expected success, would result in a major benefit to the livestock producers and a minor benefit to the Denver Stock Yard in the proportion with which the additional returns would be divided. I say that because it costs no more to market a high-quality animal than a poor or mediocre animal. The marketing charge is the same, while the producer receives a larger net return.

The Stock Yard Company undertook this work primarily because of producer demand. Complying with this desire on the part of its patrons, in the year 1906 a Stock Show was started in Denver. The first show was held in tents and other temporary structures. It met with such success that steps were immediately taken for the Stock Yard Company to provide

permanent buildings and take other action to see that the Show became an annual fixture and of national importance. This led to the building of the Stock Show Stadium in 1908 and other buildings to properly house the Show, which is now known as the National Western Livestock Show, which is admittedly the third largest and most important livestock show in the United States—and the largest show in some respects.

Outside of the Stadium and the Sales Arena the Stock Show is handled in connection with the horse and mule property, the buildings being used by the latter 51 weeks of the year and being vacated by the horse and mule people the one week of the year the Show is being held. By handling in this manner, we have been able to secure 100 per cent utilization of all buildings, except the Stadium and the Sales Arena. We also use a larger part of the main cattle division during Stock Show in the handling of Stock Show livestock. Approximately 200 pens in the south end of the yards are used for the handling of bulls. Fat cattle in the Show are yarded in the pens just north of the Exchange Building. Feeder cattle, usually over 100 carloads, entered in the Show, are yarded north of the fat cattle to about the 22 alley. . . . . In other words, the bulk of the stockyards property during Show week is devoted to purposes of the Stock Show and not merely tract or Zone 9. . . . .

Obviously, the more direct interest in the show by the largest number of people, the

greater success it will have. The Stock Show proper is operated by the Western Stock Show Association, which is an association of various persons interested in the livestock industry. This association has a Board of Directors consisting of 39 members which includes all phases of the industry. Additional Directors are provided from time to time as producers or others appear who are willing to work for the good of the industry. The directorship includes officers of the Stock Yard Company, of the packing plants, of Denver banks, railroads, producers of all kinds of livestock, and others. It has been found that by handling in this manner much greater interest can be created, more support is received from local people as well as others, and a large free ticket list is avoided. Obviously, when several business men, serving as Directors of the Show, call on a certain industry or certain people for support, they receive a much better hearing and more consideration than if someone from the Stock Yard Company did the calling and solicitation. Any additional support or revenue, of course, reduces the expense of the Show and, therefore, the expenditure of the Stock Yard Company for this purpose. By handling in this manner we have made the Show more efficient, we have created greater interest, we have accomplished better results and have reduced expenses as well as adding to income, all of which rebounds to the financial as well as the educational interest of the producer.

The Stock Yard Company, through its Pres-

ident and General Manager and Secretary and Treasurer, attends all meetings and generally supervises actions and expenditures. All money paid out must be approved by the Secretary and Treasurer of the Stock Yard Company. The General Manager of the Show reports at frequent intervals to the President of the Stock Yard Company and takes no action of any consequence without consulting with him. The existence of the Stock Show Association is in no way a leasing out of facilities or delegation of authority that the Stock Yard Company may own or have. We have substantially the same authority over the Show that we would have under any circumstances, and, in addition, in handling it in this businesslike way, have a great deal of support and interest that might not otherwise exist.

There is no principle of rate making which requires the elimination of the value of property from the rate base of a utility merely because in furtherance of the purposes of the utility a means is adopted to increase the used and useful nature of that property in the public interest. This is particularly true where, as in this case, the means is the formation of a "corporation-not-for-profit" under Colorado law, from which corporation no member can receive any distribution of earnings and whose affairs are managed by directors whose only necessary qualification is an interest in furthering the industry.

The second statement is that the property is not used to render stockyard service. Test this by the legislative definition and by the evidence of record.

On page 38 of their brief, eight lines from the bottom, counsel misquote the statute. Section 301 (b) of the Packers and Stockyards Act, 1921, defines "stockyard services" to mean "services or facilities furnished *at* a stockyard *in connection with* the receiving . . . . marketing . . . . or handling in commerce of livestock."

Counsel assert on page 39 of their brief that "livestock consigned to the market for purposes of sale never reaches the stock-show property". They further say that the only livestock which does reach the stock-show property "is fancy show stock which is brought there for *exhibition purposes* during the show week". No one who has ever seen the Denver show or who has studied this record could make such statements.

These statements raise the question, under the evidence of record, as to what is "the stock-show property", used during "the show week". The testimony of Mr. Pexton (R 831) above quoted, shows that not only the properties in Zone 9, but all of the cattle division (Zone 1) up to alley 22, which is approximately under the viaduct running between the sheep barn and the Cudahy Packing plant, as shown in the photograph in the envelope on the back cover of our first brief. Livestock *sent to the show* is yarded and cared for in this area, the fat cattle and feeders in the pens northeast of the Exchange Building, i.e. *below* the Exchange Building as one looks at the photograph, and the bulls are yarded and cared for in the triangular block of pens southwest of the Exchange Building, i.e. between that building and Zone 6. Much of this livestock is exhibited in the stadium and sold in the sales pavilion on Zone 9, excluded by

the Secretary. The carload lots of fat cattle and carload lots of bulls, because of the physical impossibility of exhibiting and selling masses of cattle in the small sales pavilion, are sold where yarded. A sales arena is constructed each year in the pen area for the feeder auction, at which up to 20,000 to 30,000 head of feeder cattle, depending upon market and economic conditions, are sold during a two-day auction session. This is as much a part of the annual show as the exhibition and sale of prize cattle on Zone 9. Neither the marketing of bulls in such large volume (R 801,1037) nor the feeder auction could be accomplished at any other time than at the show (R 796,802,941,1037). Government witness Christensen, after giving his opinion evidence on direct examination as quoted by counsel on pages 39-41 of defendants' brief, testified from his own knowledge and observation on cross-examination as follows (R 429,430):

> . . . . Yes, during the show livestock is sold in the sales pavilion but in certain other buildings I have not seen it sold. The sales pavilion is not the same as the stadium. Yes, individual animals are frequently exhibited at the stadium before going to the sales pavilion, and some of the livestock that is sold during the show week is handled in the yards proper and sold in another auction facility in the cattle division. A great deal of livestock is sent to the yards during the show time for sale. Yes, I think a good deal of grade stuff, so-called, is also sent here at that time as well as purebred breeding stock. Denver has a very extensive auction sale of feeder cattle. In point of dollars there

> is a large volume of livestock sold *at the Denver show.* There is also a large market for bulls . . . .

If Government counsel mean by "show property" those few buildings located on Zone 9 (the buildings in that zone colored yellow on the photograph), even then the testimony is clear that livestock *is exhibited in the stadium and sold in the sales pavilion,* which are the principal buildings excluded by the Secretary. We have no hesitation in admitting that it is the individual head of purebred stock, mostly for breeding purposes, which is sold in the sales pavilion, carloads of purebred stock being sold, as we have stated, in the pen area where they are yarded, *but there is no provision of the Packers and Stockyard Act, 1921, or any rule of law which determines that the sale of purebred livestock is not the "marketing and handling in commerce of livestock" or which gives the Secretary of Agriculture jurisdiction to prevent or impede such sales.* Counsel will say that the Secretary does not prevent the Yard Company from engaging in any business it likes but only says that the value of properties so used cannot be included in the rate base. This is sycophantic. The denial of a fair return is the most effective means of prevention and hindrance which bureaucratic authority has yet devised. It is not to be presumed that Congress intended to give to any administrative officer or body, power to prevent or impede any public activity which would improve the quality of meat producing animals, or increase the efficiency of and gains to the producer.

The portions of the record just cited as well as those cited at pages 35 et seq. of appellant's first brief con-

tradict the assertions of the Government that income is not derived by appellant because of the show. The Government entirely evades the mass of uncontradicted testimony mentioned in our first brief establishing that the Stock Show has built up both the receipts of livestock and the demand for livestock at the Denver market.

The record references which follow are to the pages of the record where these facts are definitely established. Record pages 686-687, 697, 795-796, 801-802, 831, 834, 837, 843, 941. We again say that there is no contradictory evidence. Government counsel cite but two cases in this portion of their brief, namely, the decision of the District Court from which this appeal is taken, and *St. Joseph Stock Yards Company v. United States,* 298 U.S. 38 at p. 57, where this Court was dealing with the exclusion by the Secretary of a hotel, called the Transit House. There is nothing in the St. Joseph Stockyards case on this point which is contrary to our position. In that case it was found that there was no showing made that the absence of the Transit House would materially affect the business of the yards and for that reason the finding of the district court and the Secretary was therefore upheld. In the instant case, as above shown, the evidence is full and complete to the effect that the stock show and the use of these buildings for that purpose is intimately connected with and does affect the business of appellant. If, as stated by this Court, it is proper to exclude property which does not affect the business, we submit that it follows conversely, that it is improper to exclude from the rate base the value of property the absence of which does definitely affect the business.

Furthermore, in view of the evidence in this case, we maintain that the Secretary is inconsistent. If it be proper to exclude the two or three buildings in Zone 9, it is proper to exclude the bulk of appellant's yard. The testimony establishes, as above pointed out, that the bulk of appellant's yard is devoted to stock show purposes during stock show week. The sales arena erected in the Cattle Division near the viaduct, shown in the photograph, is no different from the sales pavilion in Zone 9 so far as the function thereof is concerned. The only difference is that it is not roofed and must be taken down and put up each year at considerable expense. We would prefer to have a permanent arena of sufficient size in this locality for that purpose but its absence certainly corroborates the testimony of Government witness Christensen (R 429) and of the other witnesses who testified upon the point that the facilities are not excessive or not needed for the show.

At pages 50 to 52 of brief of defendants, counsel advance the argument that appellant's claim of income derived from the show is speculative in the face of testimony from producers that livestock is held back for the show. Counsel argue from this statement that the livestock would arrive at some other time. The evidence of record is to the contrary. Such evidence is easily understandable if the conditions confronting a range market are understood. As we pointed out in our first brief, range cattle are largely driven off the forest ranges and open ranges by climatic conditions and this results in a very seasonal condition at Denver. The cattle run commences generally in September and ends about December 1st. Producers, knowing the conditions, will cull out of

their herds uniform carloads which, for one reason or another, have so matured as to make it likely that they would show to advantage and command the higher price which is usually received during show week (R 794, 835, 968, 1003-1005). The manifest reason for holding back livestock for the show is to receive this higher price. It also serves the purpose of preventing a glutted market (R 795, 801). Producers Pace, Jamison and Mitchell testified directly (R 687, 795, 801) that at least a percentage of the livestock would not come at other times. The facts in evidence concerning January sales, compared to the sales in December preceding and February following, at the Denver market, demonstrate not only that the stock show does affect the business of the yards but also that income in large amount is derived directly from and on account of the show. There is no denial in the brief that although the Secretary has excluded the so-called stock show properties, this income has not been excluded from the income account.

The justification advanced for this by the Government is that this income is earned "in the yards". That is true, but it is, nevertheless, income directly traceable to the show. For example, a part of that income is the yardage charge of $1.00 per head on the 1,500 to 2,000 bulls which are annually received and could only be received and sold in such volume at the stock show. Government counsel do not mention this market on bulls which admittedly, and in the evidence, is the largest market of bulls in the United States (R 795, 801, 833) and which would not occur except for the stock show (R 687, 801, 833). Perhaps Government counsel will again argue that these bulls are "fancy show stock." We again reply that they are

"livestock" within the meaning of the Packers and Stockyards Act, and particularly necessary to the production of livestock in commerce because of the state and federal requirements which require only registered bulls to be turned loose with herds on the public domain (R 801).

At page 41 of defendants' brief, it is said that the fact that buildings located on the show property stand idle during fifty-one weeks of the year is persuasive evidence that these buildings do not subserve a stockyard purpose. The length of use is not the criterion, provided the benefit to the industry, both from the standpoint of its patrons and from the standpoint of the utility itself, is constant and continuous, which the evidence in this case shows it is. In any event, the statement is not correct, nor are the findings of the Secretary and the Court to the same effect, sound. The barns on Zone 9 are utilized by the horse and mule division at all times of the year when not utilized for the stock show. These barns were not excluded by the Secretary but merely the stadium with its heating plant and hook up shed. The sales pavilion and tile barn were also excluded. These with the barns and half of the cattle area are in the truest sense the show property and its use is not limited to one week. The pen area, for example, which is occupied by the bulls during one week and by the fat and feeder cattle sent in on account of the show, is partially utilized during much of the remaining portion of the year and fully utilized during the peak seasons of the cattle run by livestock having no connection with the show. There are blocks of pens at the north end of the yard which are only utilized during the heavy seasonal run of cattle. These are properly included by the Secretary because a

public utility must be prepared to take care of regularly anticipated peak demands. Viewed from the standpoint that the cattle division up to alley 22, as well as all of Zone 9, is devoted entirely to the stock show, there is no more reason for excluding the stadium and sales pavilion because they take care of this peak demand of the show for a certain type of facility, than there would be for excluding the blocks of pens at the north end of the yard to which we have just referred.

It is immaterial that certain other yards listed in the note on page 47 of the brief of defendants do not have stock shows comparable to the one held in Denver. Other managements may not deem them essential and yet, of the markets which are known as the ten central markets, six do maintain such shows. As stated on page 966 of the record, due to the shows at Omaha and Kansas City, there is not the same need for such a facility at Sioux City and St. Joseph, Mo. With the largest show of all at Chicago, there is not the same need for a show at St. Paul.

The fact of the matter remains that the evidence demonstrates that the stock show has been and is a powerful medium for the development of business at the Denver market. It makes no difference whether it be deemed an advertising medium or a factor of general benefit to the industry. If the Secretary wishes to make us an advertising allowance equal to 6¾% on the value of the excluded show properties, the result would be the same. The proper basis, however, is that the stock show is a proper activity, entered into by the management in good faith, concerning which there is a complete absence of any showing of

inefficiency or improvidence. Under such circumstances, the Court will not substitute its judgment for that of the management and will not permit arbitrary interference therewith by the administrative board. *West Ohio Gas Co. v. Public Utility Commission,* 294 U.S. 63 at 72, *Banton v. Belt Line Ryy,* 268 U.S. 413, 421, *Southwestern Bell Telephone Co. v. Public Service Commission,* 262 U.S. 276 at 288, 289, *Denver Union Stock Yard Co. v. United States,* 57 Fed. (2d) 735, 748.

II.

THE DENIAL BY THE SECRETARY OF GOING CONCERN VALUE.

The argument of the Government (brief of defendants pages 54-83) is that there has been no denial of going concern value or exclusion thereof from the rate base, but that such value "is inextricably interwoven with other values" and hence no separate allowance need be made. The Government also says that appellant has failed to offer such clear and convincing evidence of this value as would authorize a separate allowance.

At the outset let us agree, as we did in our first brief, that no separate allowance need be made *if it is a fact that such value was included otherwise in the valuation of the utility property.* The question, therefore, squarely presented is whether or not there is such extra allowance in the valuations in this case. Government counsel have for the most part contented themselves with citation of the findings of the Secretary and of the trial court and quotations from the opinion of the trial court, but we submit that since

these are the very findings which we charge to be erroneous such citations lack probative force.

At the bottom of page 72 of the brief of defendants, counsel recognize that the rule in The Minnesota Rate Cases was designed to eliminate the possibility of valuing the land in such a way as to include an increment of value attributable to the going concern element. They say, however, that while this is the case when the rule is applied to railroads, gas, water and light plants, it does not work out that way in the case of stockyards, because the value of the stockyard land is influenced upward by the presence of packing houses and related industries surrounding the stockyard land, which industries would not be present but for the stockyards.

Whatever theoretical basis there may be for such an argument, which we deny, the fact of the matter is that it was not followed by the Government witness. This is easily demonstrable from the record. Mr. Zelinski testified in the first place that when he stripped the stockyard land of all improvements, including therein all of the alleys and roadways which lead to the related industries, it left the tract as a large tract without dedicated public highways and hence of decreased value. We quote briefly from the Government testimony:

> It should not be overlooked, however, that for the purpose of comparing the values of this property with the sales of units comparable to the integral portion of which the yards are now comprised, it is necessary to take into consideration the lack of dedicated public streets and alleys to serve so large an area. (R. 477).

Where I spoke of the absence of highways in the tract I mean an absence of dedicated public streets * * * You must remember in this case I am valuing this property not for the special use and in the special way that the Stockyard Company is using it, but I am considering its availability for a stockyard use and stripped of these improvements I am trying to visualize the effect of the lack of direct access to a large portion of this area, which I think should be considered in the valuation. (R. 495).

Yes, I testified that I had appraised this property in accordance with my interpretation of the Minnesota rate case, which is with all the packing houses and other related industries in place, but with the stockyards and the improvements which themselves constitute the underground and superficial structures of the stockyards removed. No, I do not think it is inconsistent to say that with this interpretation of the Minnesota rate case the presence of the packing plants *would influence the value downward* to other industries, because in seeking to fix the upper limits of value on the property one of the controlling things, of course, is to determine what the land might be worth for an alternate industry, which is of a higher character than the stockyards company, and if it were so available I would then have to look for the values of that higher use. In this case I reached the conclusion that a stockyard utility would be its highest utility. Yes, in this case *the lessening in price due to the packing*

> *plants being there* is more than offset by the fact that the zoning law of the City and County of Denver requires that an industry of that type and of the type of the stockyards be in this section, but I still had to look to see if the property under the circumstances could be used for a higher utility. (R. 533).

In view of the above quotations from the record, there is manifestly no basis for the argument of counsel above referred to, nor for the further statement appearing on page 72 of the brief that were it not for the fact that the stockyard is a going concern with a business intimately correlated with the railroad and packing industries, the land valuations determined by Mr. Zelinski obviously would be considerably reduced. Mr. Zelinski testified exactly to the contrary, as above shown. He did testify that the zoning ordinance of the City and County of Denver more than offset his assumed depressing factors, but we submit that this is the allowance of present value of the land as such, and not of any going concern value of appellant's plant. It stands on the same basis as his other elements of value, such as proximity of the land to highways, availability of water, drainage possibilities of the site into the Platte River, nearness to good labor supply, etc., all of which, we repeat, are elements of the present value of the land as such, necessarily regarded and considered by any appraiser in the valuation of land, no matter for what industry it may be valued, and not the measure of the going concern value of the business.

When we also consider that Mr. Zelinski disregarded the offer of Mr. Burkhardt of $10,000.00 an acre for

Zone 6, and disregarded the actual price paid by the Local Beef and Mutton Company for its tract, both of which prices we admit were influenced by the availability of a stockyards to packing plants to be constructed (R 501, folio 472; R 510, folio 515) it is apparent that his valuation of the stockyards land was not influenced *upward* by comparative sales to correlated industries.

So much for the land. The remaining question is whether or not going concern value was allowed in the valuation of the structural property.

It is admitted that the structural property was valued upon the basis of unit costs of material and labor. As a matter of fact this could not be denied in view of the testimony of record by Mr. Zelinski whose valuation was adopted *in toto* by the Secretary. That testimony is quoted at some length in our first brief at pages 18 and 19. Government counsel, however, say that because to these bare costs there has been added the construction overheads and general overheads, an adequate allowance for going concern value has been made. Consider the items which counsel claim are general overheads as distinguished from construction overheads. There is the item of "Ommissions and Contingencies." Whether they be called construction overheads or general overheads is of small moment because they are a definite factor in the cost of any construction and are figured as such by any person, firm or corporation embarking upon the construction of an industrial plant. Omissions and unforeseen contingencies universally come in and add to the *cost* of the construction.

"Engineers' and architects' fees." These by the very

terms used have to do with the construction and are universally considered part of the cost.

"Taxes during construction and interest lost upon the money tied up in material and labor" are likewise under any sound business reasoning part of the cost of the construction.

The only two items which perhaps might be viewed differently which are direct general overheads are the items of legal expense and general salaries and expense. At page 523 of the record, Mr. Zelinski states that no organization expense of any sort is included in any of these overheads, and that the item of salaries of officers and expense covers the expense "which would be necessary to look after the payment of vouchers and checking up on the performance of the contracts during the period of the construction." As thus limited by the witness, we submit that these are likewise construction costs.

The net result is that our statement as made in the first brief remains uncontradicted, namely that the valuation of structures in this case was made entirely upon the basis of the actual present-day unit costs of so much lumber, so much brick, so much concrete, so many hours of labor, so much superintendence required to build the structures. There is no element of going concern value included in any such basis of computation.

Government counsel, however, say at page 71 that the very method of ascertaining value for rate making purposes that was employed in this proceeding tended to establish a valuation "sufficient to recognize and cover the going concern element, even if it had not

been covered in the valuation of the specific structures." This statement is made upon the basis that the method adopted was reproduction new cost less depreciation, "unmodified by consideration of the actual or historical cost." Counsel say further that if their valuation engineers or the Secretary had considered other factors legally recognizable such factors "would undoubtedly tend to diminish the value further."

We particularly take exception to such phrases as the one last quoted. It is pure assumption on the part of counsel. There is not the slightest evidence of record which indicates that any of these other factors would have diminished or tended to diminish the value as found. The Government introduced no evidence of historical cost of the entire property, yet counsel say that the major portion of appellant's structures was built many years ago when labor and materials were considerably less expensive than at the present time. There was no proof made as to what the building costs were at such former time. On the contrary, Mr. Zelinski himself evidenced either a great reluctance or lack of knowledge of existing facts as to the date of construction of the major portion of appellant's plant. At pages 521 and 522 of the record Mr. Zelinski admitted that in 1917 appellant built a large section of the cattle division, but he did not know whether it amounted to 29% of the total cattle area "but it was a very large proportion of the plant". He further admitted that in 1928 there was a further extension of a material portion of the cattle division. "No, I did not figure whether it was 16½% of the entire cattle area, but I knew it was material." In 1929 the sheep barn, which, incidentally is the largest concrete sheep barn in the world, was completed, neces-

sitated by the fact that Denver has become the largest feeder sheep market in the United States. We submit that these are the major portions of our yard, not built, as counsel say "many years ago" or in piecemeal construction, or at times when materials and labor costs were much less. The statements of counsel are utterly without foundation in the record. This is a judicial proceeding, and findings to be sustained must be based upon evidence of record. There has been no abandonment of this proposition by this Court.

We submit, therefore, that there has been no showing on the part of the Government of any allowance for going concern value, which the Government admits exists in appellant's plant and business, or that any such excess value is inextricably interwoven with the valuations as found.

Government counsel cite six cases, all of which were cited in appellant's first brief. We differ with counsel's interpretation and adaptation thereof. In the *Cedar Rapids Gas Company* case,* the attempt was made to include in the valuation of a gas utility an extra value on account of the franchise or governmental grant by the municipality, but this was denied, and properly so, because whatever additional value resulted from the franchise was the result of a relinquishment by the sovereign people of a part of their sovereignty, for which the utility could not take credit.

In *Des Moines Gas Company v. Des Moines,* 238 U. S. 153, a reading of the case will show that there was included in the value of the gas utility $6,000.00 for organization expenses and $300,000.00 for pro-

* Cedar Rapids Gas Company v. Cedar Rapids, 223 U. S. 655.

motion, organization and legal, injuries and damage expense. These were designated as overheads, and were found by the Court to be the equivalent of going concern value, but this Court, in full accord with that finding, stated:

> That there is an element of value in an assembled and established plant doing business and earning money over one not thus advanced is self-evident. This element of value is a property right, and should be considered in determining the value of the property upon which the owner has a right to make a fair return when the same is privately owned, though dedicated to public use.

The Court found that the allowance of a large amount for promotion and organization expense was the equivalent in that particular case of that additional value. Mr. Zelinski expressly testified, as above noted, that no organization or promotion expense was included in any of his valuation figures.

In *Los Angeles Gas and Electric Corporation v. Railroad Commission*, 289 U. S. 287, this Court found that an extra allowance of $5,500,000.00 was included in the rate base of that gas and electric utility, which might appropriately be assigned to elements of value which were not otherwise fully covered. This Court stated (page 317) that "the fact that this margin in the rate base was not described as going value was unimportant if the rate base was in fact large enough to embrace that element." In order for the Los Angeles case to be pertinent or authoritative in the instant case it is necessary for the Government to establish the existence of this excess or margin. As above

shown there is no evidence supporting any such finding.

In *Dayton Power and Light Company v. Commission,* 292 U. S. 290, the true basis for the denial of going concern value was the fact of the recent organization of the Power Company. Also, an allowance was made in the rate base for the cost of attaching new business, and, both under the theory and the decisions of this Court, attached business is the chief element in going concern value. In the Dayton case, the amount allowed as the cost of attaching business was not as great as the amount of going concern value claimed by the company, namely from $125,000.00 to $140,000.00. The Court pointed out, (page 317) that the Power Company was a new company, engaged in business for a few years with total physical assets of the value of less than $1,000,000.00. Its claim to any going concern value was stated to be that "in the brief term of its existence it professes to have added to that value from $125,000.00 to $140,000.00 by combining the parts into an organization and causing them to work together." This Court denied this, saying that going concern value is not something to be written into every balance sheet as a perfunctory addition, but something which calls for an examination of the history and circumstances of the particular enterprise. Appellant, in the case at bar, has been in existence since 1886. The history is a long and successful one. Mere valuation of its plant as one which is "able and willing" to earn an income does not give consideration either to the history or circumstances of this particular enterprise.

In *St. Joseph Stock Yards Company v. United States,* 298 U. S. 38, it is stated that there appellant failed to

make clear and convincing proof of the existence of the value. Reliance there was made entirely upon the hypothetical and speculative theory of a Mr. Howson. Counsel say that the testimony of Mr. Hyder in the instant case is equally speculative. In the Howson theory an attempt is made to determine the cost of attaching business. To do this he contrasts a hypothetical plant with an existing plant, attempts to allow for the effects of competition and to estimate the cost of the amount of solicitation assumed to be necessary to get the business up to its present volume. Mr. Howson speculates in various other ways, reaching finally a total figure. Mr. Hyder, as an expert, and based upon his years of experience as shown by the record, applied a value figure of $10.00 per car to *the volume of business as shown by exhibits of record.* The only element of speculation is his opinion that the volume of business had a value to a purchaser of $10.00 per car. His testimony is no more speculative than is the testimony of any expert witness called upon to give opinion evidence as distinguished from factual evidence.

However that may be, Mr. Hyder's testimony was only corroborative of other testimony in this case as to actual expenditures made for the purpose of developing or attaching business. We deny that there is any similarity between this testimony and the capitalization of past losses condemned in the Galveston case. As stated in our first brief the record substantiates the fact that these expenditures would and have attached business.

Brooklyn Borough Gas Company v. Prendergast, 16 Fed. (2d) 615 at 636:

> The cost of *obtaining* the valuable, but intangible asset, which has come to be known as "going value," is not, in my opinion, to be confused with "pioneer losses," which the courts have held are not to be capitalized. I do not regard Woods' estimate of the amount of time, labor, and money necessary to develop the business as in any way the estimation of pioneer losses. It is a cost that must be met, if the business is to be successfully established. To hold such costs as losses, and deprive a utility of the advantages to be gained from such expenditures, would be manifestly unjust. Such costs have their reflection in going value. . . .

This is the principle upon which appellant proved the expenditure of slightly more than $325,000, for the purpose of attaching business to its market. A court is not required to shut its eyes to certain practical facts. The Packers and Stockyards Division of the Department of Agriculture can point to no case where a successful stockyard has not been required, after its construction, to make grants and subsidies to at least one or more nationally operating packers and several commission men and yard traders. A packing plant represents a large investment and the packer must be induced to take the gamble of such a large investment at the new point. The commission man and yard trader must be induced to enter the new market and commence a buying demand which will attract others to that market. These grants and subsidies are not "gifts" as counsel calls them, in any true sense of the word. The *quid pro quo* received by the Yard Company is the buying outlet which is necessary to the existence of a market. There are three national packers

with large investments in plants surrounding the Denver market. At least three other national packers are constantly represented by order buyers. The record is full of uncontradicted proof of the strength of the buying demand on the Denver market. Valuation of appellant's property on the basis of present value of land plus unit cost of structures, with or without overheads, cannot reflect the going value of appellant's established business.

We are mindful of the language of this Court in the *St. Joseph* case, to the effect that the plaintiff stockyard had not established the existence of going value by clear and convincing proof of its existence. Whatever may have been the facts in the St. Joseph case, we respectfully submit that in a case of the nature of the case at bar, no burden is upon the Stock Yard Company to offer clear and convincing proof of going concern value. The case would be different had the Secretary denied that such a value exists in the plant, because then appellant would be under the recognized obligation of showing that such finding is not supported by substantial evidence. In the instant case, however, the Secretary makes no such finding, but on the contrary (R 309 et seq) finds that such value does exist in appellant's plant. The rate investigation in which that finding was made was instituted upon the motion of the Secretary himself and without complaint. Under the Packers and Stockyards Act, the Secretary is without power and authority to change existing tariffs unless the rates are unreasonable and, in theory at least, the investigation, therefore, is for the purpose of determining whether or not the rates are reasonable. The law presumes an impartial investigation, and clearly in the first instance no burden of proof of sustaining the reasonableness of

existing rates is cast upon the Stock Yard Company. We submit that we are not called upon to prove the amount of going concern value. We agree that we do have the burden of demonstrating to this Court from the testimony of record that going concern value is not included in the valuations of property. The ascertainment of the amount of going value is for the rate-making body.

For example, suppose in this case that this Court finds from the evidence that the land was valued on the basis of bare land stripped of improvements at present value; that the structures were valued on the basis of unit costs and therefore that the finding of the Secretary that going concern value was included in these valuations is without foundation. The ultimate result of such a decision would be to cast upon the Secretary in the impartial investigation required by the Packers and Stockyards Act the duty of ascertaining in the next investigation the amount of excess allowance, whether or not it be called going concern value, which is included in the valuation to cover this element. Such a finding having been made, if the appellant then contests it, it will be the duty of appellant to offer clear and convincing proof that the amount of excess so found is not the fair and reasonable amount of its going concern value. That, however, is not the instant case. In the rate investigation here involved, appellant did offer proof of the cost of attached business in an effort to have the Secretary give proper consideration thereto and include some such amount in the rate base of appellant. The Secretary failed to do so and contents himself with stating that the valuations as made on the basis of reproduction cost less depreciation of physical assets adequately covers this element, *without being*

able to point to a single item of excess value to which such label can be attached. We again point out to this Court, as mentioned in our first brief, that it is contrary to the theory of going concern value to hold that it is a depreciable asset affected by lapse of time unless there be proof of a stagnant or retrogressing enterprise. No such proof is in the record, and yet the Secretary depreciates 20% the items of overhead which are the only items to which Government counsel can possibly point as including this element of going concern value.

We submit that the findings of the Secretary are contrary to the evidence and no argument or cited authority in the brief of defendants destroys this position.

III.

THE CHARGE TO YARD TRADERS.

This section of the brief of defendants, commencing on page 83, does not meet either the argument made or the authorities cited in Section IV of appellant's brief. Government counsel's argument, like the findings of the Secretary, is not grounded upon the evidence of record.

On page 85, counsel say that there is a separate division within that part of the stockyard known as the cattle division which is called the trader division and cites page 240 of the record as authority for this statement. *That page of the record is the finding of the Secretary to which we take exception in this case and which assertion is unsupported by the evidence.* It is the "questioned document", so to speak, and cannot properly be offered to prove the questioned facts.

There is no separate trader division in the sense implied by the Secretary or by Government counsel, i. e.

of a facility or block of facilities constructed for them to enable them to conduct their business in the yards. There is a trader division during the period of heavy receipts, just as there is a commission men's division and a packers' division, but none of these so-called "divisions" are set aside for the purpose of aiding the packer, the commission man or the trader to engage in business on the Denver market, or for the purpose of granting any such class a special privilege in aid of his business. *As stated in our first brief at page 72, pens are allocated by the Yard Company to the packer, the commission man and the trader for the Yard Company's own orderly operation and management of its business and its yard and for no other purpose. No member of any of these classes, nor the class itself, acquires or has any right, title, or interest, by way of lease or otherwise, in any pen or block of pens.*

Government witness Christensen (R 416) testified concerning the allocation of pens, as a result of which these so-called divisions occur, thus:

> It is part of the program of management of the yards for the utilization and orderly conduct of the Yard Company business. Yes, the Yard Company can change these assignments at any time it sees fit and apparently does so.

And again at page 419:

> When I spoke in my report of packer pens, I did not mean that they are leased to the packers but are only assigned to them in the orderly operation of the Yard by the Yard Company.

Julius Wolf, the only trader who testified in this case, stated (R 993):

When I said a moment ago that "our men drive them to our pens," I mean by that the pens that have been allotted to us by the Stock Yard Company. We have no lease on those pens and they can take them away from us and do take them away from us when they need them and make us yard our cattle some place else, in a good many instances, especially when there is a large run.

Mr. Pexton, assistant general manager of appellant, also testified (R 887) that the allocation or assignment of pens to commission men and traders is for the convenience of the company and its efficient handling of the patrons' cattle.

We repeat, there is no foundation whatever for either the statement of counsel or the findings of the Secretary that the trader is given or has a "division" of our "valuable facilities" yet this is the sole ground for the Government claim that the trader receives free service and hence is the recipient of a discriminatory privilege unless charged therefor. It is misleading to say (brief of defendants, bottom of p. 85) that during the light season, traders are allocated pens in the commission section of the yards *"to avoid the necessity of driving livestock to the trader division."* This implies a permanent trader division which is temporarily abandoned during the season of light receipts. Nothing could be farther from the fact, as the above testimony shows.

At the top of page 87 of their brief, counsel say that the trader operates on both sides of the market, that as buyers they afford part of the market outlet and compete with other buyers. Counsel say that in his selling operations, the trader is a competitor of ship-

pers who have livestock on the market for sale. Analyze these statements in the light of the evidence.

Government witness Christensen (R 421) and all producer witnesses (R 691, 791, 802, 942) testified that the buying outlet—a strong buying demand—is what the shipper wants and must find in the market he patronizes. The stronger buying competition the better the price to the seller (R 791). From this standpoint, therefore, the trader is beneficial to the shipper.

But, a market, particularly in the range country as distinguished from the corn belt or feed lot country, which has a buying demand only from order buyers or for uniform lots of livestock, is only partially fulfilling its public function and duty. The order buyer dealing solely on commission, has little or no capital investment and buys livestock of a particular type for particular orders. He is not in position to, nor does he, buy odd lots and out of these odd lots sort and accumulate uniform lots of livestock. During the range cattle peak season of September to December, the bulk of the shipments contain odd lots. That is the way the shipper sends his livestock in and yet they must be absorbed. Cattle cannot be sorted either on the range or at the loading point (R 942). The yard trader's most important function is to buy odd lots and clean the market (R 942, 947). At Denver or at any range market, the trader is essential. Producers would not ship to a market where the trader demand was light (R 802). So from this further standpoint, the evidence shows that the trader is not only beneficial but essential to the shipper.

Now, the shipper is neither blind nor stupid. He knows that when a trader buys, the trader must sell.

His sale to the trader is on that known basis. His approval of and demand for the trader as a part of the market outlet is on that known basis. There is not the slightest factual or legal basis for the separation and segregation of the trader function indulged in by the Secretary. The evidence in this case shows that the producer or shipper knowingly and willingly pays in the marketing charge assessed against him for whatever is necessary to secure and insure the full operation of the trader's function (R 792, 943). The trial court in its opinion (R 1273) cited this fact as proof that the trader was receiving free service and therefore is the recipient of a discriminatory privilege. This we submit is erroneous. *If I willingly pay a price which includes a service for another whose business will further my own, that service is not "free" in any true sense, nor does it result in any undue discrimination against me.* That, we insist, is the shipper-trader situation in the case at bar.

But the Secretary and counsel say the trader competes with fresh arrivals on the market and that this is detrimental to the shipper's interests. If he does so compete, that is intended by the shippers and the trader's buying service could be held to have been paid for on that basis. No shipper has yet complained. The Government offered no proof either of the extent of such competition or of its existence. The cross-examination of appellant's witnesses does not show that such competition is otherwise than slight (R 691, 797, 1019).

The argument of counsel for defendants does not meet in any manner the argument contained in appellant's brief commencing on page 71, that the charge, which is made by appellant and called by the Secretary

a "yardage charge", is assessed only when the shipper's livestock is sold and is in fact a marketing charge. It is a charge for the use of the market and not for the use of facilities only. It includes the cost of the Yard Company in furnishing all services necessary to effect a speedy and complete marketing of the livestock received.

Counsel say at page 92, that the yard trader, while being a purchaser, is also a seller and that the existing rate structure does not treat both or all classes of sellers alike. It is true that part of the yard trader's function on the market which, as we have shown, is thoroughly understood by the shipper and intended by him, is to sell or otherwise dispose of the shipper's livestock which the trader, in performance of his function, has absorbed. The record demonstrates, however, a very decided difference between the shipper as a seller and the yard trader as a seller. The shipper ships his livestock, in practically all instances, to his agent, the commission man, for sale. These cattle are therefore offered generally on the market and use the market machinery. The yard trader, on the other hand, as fully established by the evidence, is familiar with demands of persons not at the market and either because of orders in his pocket, in which case like the order buyer, he buys and ships out or because of contacts outside the market, he obtains those orders after he has absorbed the cattle (R 691, 797).

Mr. Wolf, the trader who was called by appellant, has sufficient volume (25,000 to 30,000 head annually) so that his firm does not exercise an order buying function but is purely a yard trader. Commencing with page 989 of the record, he describes his market function and

particularly the trader method of selling. He points out that after he buys cattle, he calls his clients in the country by telephone, and knowing their needs (R 991), resells without those men ever coming on the market, that only 3% of his total purchases (R 992) are sold "out of our alley to people who casually come in" and those are not even reweighed but sold on original weights. We submit that the evidence clearly establishes a vast difference between what the Secretary designates as the two classes of sellers.

At the Denver market, different from the St. Joseph, Omaha, Kansas City and Chicago markets, when the trader does appear on the market as an ordinary seller comparable to the shipper, and sells through a commission man, *he pays the full marketing charge the same as any other shipper.* We are mindful of the fact that in the note appearing at the bottom of page 84 of the defendants' brief, it is stated that the Secretary's schedule of rates has always been treated by the Government as authorizing the full charge on livestock resold through commission men and that in counsel's supplemental brief filed in the trial court, the Government stated that the Department so interprets the rate schedule. If so, then not only the stockyard companies at St. Joseph, Omaha, Kansas City and Chicago, but also the yard traders are misinformed. It must be admitted that livestock sold by the yard traders through commission men is "resold livestock" and in the rate order in this case appearing at page 346 of the record, it is provided:

> Yardage will be charged as shown below:
>
> (1) On livestock received and sold at these yards, also including livestock resold through commission firms. . . .

Rail:

Cattle	$.30 per head
Calves (under one year old)	.20 per head

. . . . .

Resold and/or Reweighed for purposes of sale:

Cattle	$.15 per head
Calves (under one year old)	.10 per head

. . . . .

Trucked in or driven in:

Cattle	$.35 per head
Calves (under one year old)	.25 per head

. . . . .

Cattle purchased by the yard trader are purchased from a commission man and if the Government's contention is correct, that first sale is the one which comes under the heading of arrivals by rail. The exact contention made by the Government as the basis for the imposition of this charge is that the cattle are "resold". The transactions, therefore, clearly fall within the resale provisions of the rate schedule. It is the rate schedule which must be published and posted. There is nothing under the Packers and Stockyards Act which provides for the posting of an informal interpretive construction.

At pages 83-84 of defendants' brief, it is stated that appellant does not question the Secretary's estimate of the product of the rates and that obviously no question of confiscation is raised because the Secretary reduces no rates. It simply authorizes the imposition of charges which had not hitherto been made. No error is assigned in this appeal involving the estimated amount which would be raised by the Secretary's rate to yard traders.

The ease with which this charge can be avoided by purchases in the country or by selling on original weights is too plain for any argument. The point was raised and relied upon in the court below. If we are correct in our contentions that the yard trader's function is included in the marketing charge, then this double exaction is improper and results in a reduction *pro tanto* of the existing rate schedule. For example, it is part of the cause of the reduction of the cattle rate from 35c to 30c per head.

The *St. Joseph case* is not decisive and neither is the Omaha decision of *Tagg Bros. & Moorhead v. United States* 29 Fed. 2nd 750, cited by defendants. At St. Joseph a half yardage charge was being assessed against the yard trader even where the livestock was resold as planted livestock through commission men. The question there in dispute is clearly shown in the opinion of this Court, 298 U. S. 38 at page 70:

> The appellant insists that the secretary overestimated the income from this source by $20,803. The controversy is over the number of livestock to which the charges for resales or reweighs for the purpose of sale would apply.

In the Tagg Bros. case, commission charges and not any charge imposed by the stockyard company were involved, and it was found that the commission men were only charging half commission to yard traders on livestock sold by the commission men for the yard trader. Both these situations, we would agree at once, are discriminatory in the extreme but we submit, conversely, that the practice as in force at Denver of treating all sellers alike when they utilize the machinery of the market and charging the same marketing charge

to all such sellers is not discriminatory. Since it is not discriminatory and is established both by the evidence of producers as well as by the testimony of the management, that the practice is one desired by the producers and is in furtherance of the efficient marketing of livestock, we submit that it is a matter which falls within the discretion of the management. The Secretary is without jurisdiction to change it in the absence of clear and convincing contrary evidence. Such evidence cannot be found in the record. We repeat, that the interference with existing rates must be based upon evidence and that those rates cannot be changed or reclassified upon the whim of the regulatory body.

IV.

LAND VALUATION.

The Government replies to our contention that the testimony of Government witness Zelinski is not substantial evidence:

1. That his admitted lack of knowledge of local conditions is immaterial;

2. That he is a graduate civil engineer with long land appraisal experience in railroad work under the Interstate Commerce Commission;

3. That he has been accepted as a qualified witness in the Omaha and St. Joseph cases;

4. That appellant's witnesses considered earning power and intensive use as elements of value contrary to the rule of The Minnesota Rate Cases.

We will answer these briefly and in that order.

(1) Counsel quotes the statement of the trial court (R 1271-1272) that Mr. Zelinski's lack of familiarity with local conditions is as immaterial as is the fact that the three experts offered by appellant "never valued any other stockyards before, either in Denver or elsewhere." We submit that this demonstrates an erroneous viewpoint affecting the court's decision. The question at issue was the present value of *this particular* tract of industrial land in Denver, Colorado. The question was not what its value might be as a stockyard compared to stockyard values in Denver or elsewhere.

The record does show that Mr. Eppich, one of appellant's experts, had appraised this land in 1920, again in 1925, again in 1930 and had made this appraisal in 1935 (R 776). Mr. Eppich has been on the City Zoning Board since 1925, and thrice Chairman thereof. In addition, he had had thirty-eight years experience in real estate and appraisal work in Denver (R 775). With this background, he spent one month in the current appraisal of appellant's land.

Mr. Newcomb, another of appellant's witnesses, with thirty-three years experience in the real estate business in Denver, had made two other appraisals of appellant's land (R 750), had been familiar with it for over twenty years, had long and extensive experience in the appraisal in Denver of industrial tracts (R 748-750).

Mr. Ivins, the third of appellant's land witnesses, had had twenty-four years experience in the real estate business in Denver and eighteen years industrial appraisal and assemblage experience (R 698). Some of his sales of trackage property had been made within the month prior to his current appraisal (R 699, 700).

Contrast Mr. Zelinski with any one or all of the above witnesses. He spent about two weeks on the appraisal (R 497) of 131 acres of industrial property in Denver, had never been in Denver before (R 497, 517), and did not investigate the values of other large industrial tracts (R 516, 517). Mr. Zelinski may be an outstanding appraiser of railroad rights of way, but it is folly for either the trial court, the Secretary or his counsel to brush aside as immaterial the admitted lack of familiarity of the Government witness with local values and local conditions.

(2) We admit that Mr. Zelinski is a graduate civil engineer with years of experience with the Interstate Commerce Commission. This shows his educational basis or capacity for knowledge, but does not demonstrate the existence of that degree or type of special knowledge which gives probative force to his opinion on land values.

Appellant accepted Mr. Zelinski's figures as to the reproduction new cost of the structural property because it appeared from the evidence, and from his testimony that he had written to brick manufacturers, cement and lumber companies and had ascertained the delivered cost of those materials at the stockyard in Denver, Colorado, and also because he had written labor union officials in Denver, Colorado, and other employment sources, to discover the then present wage scale and labor cost in Denver, Colorado. This familiarity with local conditions qualified his opinion as to structural property. It is this absence of knowledge of local conditions with regard to land values which disqualifies his opinion.

(3) True, Mr. Zelinski's testimony was accepted

by the trial court in the *St. Joseph Stock Yard* case (9 Fed. Sup. 322, 333) but there is nothing in the reported case to show that his testimony was attacked on the ground of a lack of familiarity with local conditions. His testimony in that case was offered in connection with or corroborated by Mr. Mack, a local appraiser. The situation is entirely different in the instant case.

In the *Omaha Stock Yard case (Union Stock Yards Co. of Omaha v. United States,* 9 Fed. Sup. 864 at 874, 875) the trial court overruled plaintiff's objections to Mr. Zelinski as a witness. We submit that the *ratio decidendi* was that the determination of the adequacy of the qualifications of the witness is for the Secretary, and that the court could not interfere with that determination. We respectfully show that the rule of *Spiller v. Atchison, Topeka & Santa Fe Railway Co.,* 253 U. S. 117, 130, has been modified in this particular by the decision of this court in *St. Joseph Stock Yards Company v. United States,* 298 U. S. 38, 52, where the right of a competent court to examine the weight and sufficiency of the evidence introduced before an administrative tribunal is clearly and unequivocally sustained in all cases where it is charged that the administrative action goes beyond the limits of constitutional authority. That is charged in the case at bar.

Government counsel have cited no cases holding or tending to hold that knowledge of local values and familiarity with the property in question is not a prime essential to give probative force to the testimony of one who expresses an opinion on the value of land. The necessity for such local knowledge is shown in the following statement of the general rule (11 R. C. L. Sec. 56, p. 628):

> In regard to property value, the standard of qualification of the witness cannot usually be fixed very high. Not only are professional appraisers or dealers in the class of property in question competent as witnesses but also others who have bought and sold similar property, or who know the price paid therefor, even though that knowledge is based on secondary evidence, *provided of course, they are familiar with the property in question.* (italics ours)

(4) The fourth and last question raised by Government counsel on this point is that appellant's land appraisers considered earning power and intensive use, contrary to the rule of *The Minnesota Rate Cases,* 230 U. S. 352.

These witnesses made the statements cataloged at page 105 of the defendants' brief but these isolated statements are pulled out of their context. Bearing in mind that the rule of this Court as expressed in *The Minnesota Rate Cases, supra,* recognizes as an element of value the peculiar adaptability of the land for any particular use, these statements come within that rule. The explanation is clearly given by Mr. Ivins, one of the appellant's appraisers, thus (R 746):

> What I meant when I answered Judge Miles and stated that if pens were constructed on Zone 3 it would increase the value of Zone 3, is that any appraiser in appraising land for industrial uses necessarily figures into his valuation the potential value of the site. Perhaps I should not limit this solely to industrial appraisals. Here in Denver we use statistics covering the number of people passing certain corners, and

these figures are compiled by the University of Denver School of Commerce. I think these facts are recognized by all appraisers. The same thing is true in a certain measure in industrial property. If a particular site has clearly a highest and best use, I do not believe any appraiser can overlook the utilization of the tract, and therefore its potential value or potential earnings to a concern engaged in the highest and best use. If pens were on the tract north of Race Court in Zone 3, it would mean that the highest and best use, which all of us, including the Government appraiser, have recognized, namely the stockyards use, had come up to some of the potentialities as we saw them, viewing the land as naked land on March 23, 1935, and since those potentialities would have actually been realized by the construction of pens, this area would have tied in closely and become a part of the main area as an enlargement of that area. Hence, the value of Zone 3 would then more nearly approach the value of the main tract than it did on March 23, 1935. He (Mr. Zelinski) stated with regard to Zone 9 that the potentialities of that zone for small retail store business was what led him to give the greatly increased value which I spoke of yesterday, or about $6,000 an acre over the value he assigned to Zone 1. Except for the three stores he mentioned, those stores do not exist today on Zone 9, any more than those pens exist on Zone 3, but I take it that Mr. Zelinski and I are looking at it in the same manner necessary from the standpoint of potential intensive return from the highest and best use.

What is the rule of *The Minnesota Rate Cases?* We respectfully suggest that it has been and is as seriously misconstrued and misapplied as any decision of this Court has ever been. So far as the valuation of land is concerned, the rule is that land should be valued for rate-making purposes at its fair value, and that all pertinent facts and circumstances tending to establish that value, one of which facts is the sale price of adjacent similar lands, must be considered. Special adaptability to a particular use or uses is also to be considered and weighed. It must not be forgotten, however, that this case involved a public utility exercising a delegated governmental function in connection with which it had and could exercise the governmental prerogative of eminent domain. Hence, when the railroads in that case sought to have included in the land value of their rights of way, an excess allowance arising, as they claimed, because the railroad is "held up" and must pay more than the fair market value to acquire its rights of way, the Court very properly disallowed this claimed excess. The basis for the disallowance is sound, namely, that the railroads, clothed with the power of eminent domain, have it in their power to compel the acquisition at not more than the fair value. At page 451 of 230 U. S. the Court says:

> It is impossible to assume, in making a judicial finding of what it would cost to acquire the property, that the company would be compelled to pay more than its fair market value. It is equipped with the governmental power of eminent domain. In view of its public purpose, it has been granted this privilege in order to prevent advantage being taken of its necessities.

It would be free to stand upon its legal rights and it cannot be supposed that they would be disregarded.

It is urged that, in this view, the company would be bound to pay the "railway value" of the property. But, supposing the railroad to be obliterated and the lands to be held by others, the owner of each parcel would be entitled to receive on its condemnation, its *fair market value* for all its available uses and purposes. (citing cases) If, in the case of any such owner, his property had a peculiar value or special adaptation for railroad purposes, that would be an element to be considered. (citing cases) But still the inquiry would be as to the fair market value of the property; as to what the owner had lost, and not what the taker had gained.

The appellant stockyard, in the instant case, exercises no governmental function and does not have the power of eminent domain. It has no club with which to control the market price, and we submit that under those circumstances, there is nothing in *The Minnesota Rate Cases* which makes improper the consideration of potential use and present intensive use as elements of value since such factors are recognized and considered by every reputable appraiser of industrial land.

In the note at the bottom of page 104 of defendants' brief, counsel say we take comfort from the fact that Mr. Zelinski gave weight to erroneous figures in one instance, but that the Secretary "recognized this error and considered the value as being $16,000." We do take comfort from that, for two reasons, first, because it shows a failure to check and give weight to comparative

sales, and second, because on the witnesses' own statement it demonstrates the propriety of at least the higher value recognized by the trial Examiner but wholly disregarded by the Secretary and the trial court.

Anyone familiar with local values would have recognized that $6,000 was too low a land value and hence, that something must be wrong with the reported figures. Such a suspicion never crossed Mr. Zelinski's mind, never before having appraised any land in Denver. He might have found his error had he checked the sale with either the vendor or vendee. He did neither (R 512 Fol 524). The corrected figures show a sale at $22,300.00 per acre, instead of $8,400.00 per acre, and the witness himself said that such a difference would have "some effect" on the unit value of the Zone (R 516). The trial Examiner gave effect to this (R 88) and increased the value of Zone 1, $500.00 per acre and made corresponding increases in Zones 2 and 9, also affected by the Murphy sale. It is true that the Secretary, in paragraph 112 of the Order (R 295) recognizes that the sale consideration was $16,000.00 and not $6,000.00 but he then adopts the value given by Mr. Zelinski without any increase whatever, which the witness said should be made in such case. The Secretary does not give effect to this increased sales price in his valuations of Zones 1 and 2, but on the contrary, eliminates the adjustments made by the examiner (c. f. R 76, 80, 285, 287). The differences between the Examiner's findings and those of the Secretary are indicated by italics on the pages above cited.

The question returns to this:—Is one who has no familiarity with local values and local conditions a qualified land valuation witness and does the record

demonstrate such lack of that special knowledge as to render Mr. Zelinski's evidence not substantial. We submit that it does, and the findings and orders based thereon cannot stand.

V.

EXPENSE ALLOWANCE

Under this heading, the Government replies to subdivisions V and VI of appellant's brief (pp. 85-93, inclusive), relating to the so-called Dues, Donations and Subscriptions account, and to the expenses of this rate investigation.

The Government first points out that in our exceptions to the Examiner's tentative order, we asked for an annual allowance of $5,000.00 whereas we now say that $8,000.00 is the proper amount to amortize the expenses of the rate investigations. If, in view of the record and of the cases cited in our first brief, it is now believed that five instead of eight years is the proper period over which amortization should occur, no inconsistency with the principle at stake is engendered thereby. *The fact remains that no allowance to amortize these expenses over any period of years was made by either the Secretary or the trial court.* This, as we have shown, is contrary to law.

It is next said that the items involved are too insignificant to indicate confiscation. That the items involved under the heading of "Dues, Donations and Subscriptions" are relatively trivial in amount is admitted (see brief of appellant p. 85), but in a case of this nature they are far from insignificant. On the contrary, they are very significant of the arbitrary nature of the findings and order as a whole. Courts are not

concerned with the amount of confiscation, but with the fact of confiscation. Invasion of constitutional rights is not measured in dollars and cents.

As stated in our first brief, the excess over a bare 6½% return is $2,046.00. The eliminations of which we here complain total $11,000.00. They exceed this "excess allowance" by approximately $9,000.00 or the equivalent of $137,000.00 of rate base value at 6½%. It cannot be said that it is either insignificant or non-confiscatory. The cases cited by counsel in the note on page 108 of defendants' brief are not in point. No claim has ever been made that the bill in this case was defective or insufficient, as in the Poresky and Spielman Motor Company cases. * The remaining cases go to the proposition that the legislative branch of the government has wide discretion so long as its acts avoid confiscation. There is no disagreement on that principle. We repeat, these cases are not in point.

Counsel says on page 110 that the method followed by the Secretary was the same as in the Omaha and St. Joseph Stock Yards cases. The *method* may be the same but the basis of application must have been very different. In the St. Joseph case, ** the trial court held that it was sustained *by the evidence*. There is no evidence to sustain it in the present case.

The record shows that under the heading of "Dues, Donations and Subscriptions", the Secretary and the court excluded the following recognized business expenses (R 577 et seq. also appendix brief pp. 118-121):

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* Ex parte Poresky 290 U. S. 30; Spielman Motor Co. v. Dodge, 295 U. S. 89, both cited p. 108 of defendants' brief.

** 11 Fed. Supp. 322, affirmed 298 U. S. 38.

Denver Chamber of Commerce—Membership dues	$240.00
U. S. Chamber of Commerce—Membership dues	50.00
Junior Chamber of Commerce—Membership dues	15.00
American Stockyards Association—Members Assessment	832.56
Denver Traffic Club—Membership	18.00
Denver Commercial Traffic Club Membership	18.00
State Brand Inspectors—dinner	70.00
Denver Live Stock Exchange—Membership	95.53
Denver Tourists Bureau—Subscription and dues	100.00
	$1,439.09

In addition to the above, the record shows the disallowance of $2,171.50 of charitable donations, including $1,000 to the Community Chest. The record shows, at the places cited in our first brief, that each of the business expenditures have to do with broadening the outlet for livestock while each of the charities operate in the stockyards area and care for or assist the employes upon whom the patron depends for proper handling of his livestock. We submit that the evidence does not support the findings in this case and we deny that the Secretary has, by law, the discretion to decide that expenditures are improper when the uncontroverted evidence is to the contrary.

The management and control of the business and of the expenses thereof, with in legal limits, is still vested

in the Board of Directors, so long as they act in good faith. As stated by the late Judge McDermott in *Denver Union Stock Yard Company v. United States*, 57 Fed. (2d) 735 at 753;

> If the stockholders or directors of a corporation are willing that their corporation do its part, in a reasonable way, in carrying the public load of the community the prosperity of which is closely interwoven with its own, it would seem to be an exercise of managerial power not subject to the veto of a public official concerned only with the protection of the public against extortion.

As to the litigation expense, counsel attempts to minimize the situation by saying that up to the present hearing here has been but one hearing in fourteen years, hence the likelihood of expense in the future is slight. Perhaps present counsel are unfamiliar with the history of this Bureau. The Act was passed in 1921. The first attempted regulation of a stockyard was in 1926, and dismissed in no uncertain terms by Secretary Jardine in 1927 (B A I Docket 116). Then followed the first St. Joseph case in 1929, and in quick succession the first Denver case. Since the decision in that case, in April 1932, except for a brief space, appellant has been constantly engaged in a rate investigation with the Secretary, *and all without a single complaint having been filed by any patron.*

Furthermore, this statement does not ring true in the light of the Government testimony. Dr. Dozier, the Government economist, said that the rate would remain in effect four or five years (R 613, 625). The certainty of repeated rate controversies was recognized

in *Denver Union Stock Yard Co. v. United States*, 57 Fed. (2d) 735 at 753, 754. Because of changing conditions, periodic investigations are inherent in rate matters.

In the note appended to page 112 of the brief of defendants, counsel say the stipulation showing the costs of the present litigation to be $40,329.27 was not before the Secretary, and is not in sufficient detail to be analyzed. This comes with poor grace. Of course it was not before the Secretary. It relates largely to a subsequent time and could not be. Prior to the argument in the trial court, Government counsel asked plaintiff if it intended to introduce any evidence other than the official transcript of the evidence taken by the Examiner. The reply was in the affirmative, saying plaintiff would introduce evidence of the application of the Secretary's rates and of the costs of litigation. To save time at the trial, it was suggested that these be reduced to stipulations. This was done. The Secretary reserved the right to object on the grounds of materiality and relevancy but *no such objection was interposed at the trial* and no request for more detailed information was made. Counsel should not now be permitted to attack the facts set forth in that stipulation. These establish that the cost to the plaintiff of the present litigation is $40,439.27.

The cases cited in our first brief establish the propriety of amortizing litigation expense over a five year period. That such a period is reasonable in this case is apparent both from the history of this litigation and from the testimony of the Government rate expert. The first investigation was in 1930, the second was five years later. Dr. Dozier testified that he was giv-

ing his testimony on the basis of a rate of return which would remain in effect "from four to five years." It is prudent business on the part of a utility to resist the imposition of any rate which it may have reasonable ground for believing to be confiscatory. *Mobile Gas Co. v. Patterson,* 293 Fed. 208, 224. Charges incurred in defense of its security and perhaps of its very life are as necessary as any expenses could be. *West Ohio Gas Co. v. Public Utility Commission,* 294 U. S. 63, 74. The Secretary and the court dismissed these items of expense either on the ground that they were improper or non-recurrent. The fact remains, however, that no adequate consideration was given thereto and the findings should not be permitted to stand.

VI.

THE RATE OF RETURN.

The issue is squarely presented by the brief of defendants: Is a rate of return confiscatory which yields less than an annual average of 6½% upon the value of the property devoted to the public service? It is admitted that the Secretary's proposed schedule during the two years of 1935 and 1936 would have returned 6.1% in 1935 and 6.74% in 1936, or an average of 6.42% for the two years (brief of defendants, p. 124) and 5.68% and 6.33% respectively, or a flat 6% average (brief of defendants, p. 124 note) if the average stock show income be eliminated from the income account on the accepted principle that the exclusion of property requires the elimination of income derived therefrom.

Again using the gross income and expense figures in the stipulation (R Vol. II, p. 362), if instead of elimin-

ating the stock show income, the depreciated value of the show properties of $244,500 (brief of defendants, p. 34) be added to the rate base as fixed by the Secretary, the rate of return for 1935 and 1936 would have been 5.6% and 6.2% respectively, or an average of 5.9%. If going concern value in the amount of $325,000 be also added to the rate base, the returns for the two years would be 5.06% in 1935 and 5.6% in 1936 or an average of 5.33%. Manifestly, there is no lee-way or liberality in these rates.

Shortly after taking this appeal we informed the Government that we might endeavor to bring into our first brief, the 1937 figures and asked if the Government would be willing to stipulate as to them. The Attorney General replied that the Government could not agree to any figures without checking the books and that due to the shortness of time, that was not feasible. It was stated that if we included such figures without such audit and check, the Government would probably object on the ground that such data is not in the record. We do not criticize the Government for this stand. It was and is entirely proper but we mention it so that the lack of this information will not be unexplained to the Court.

The Government argument in support of the 6½% rate of return of the Secretary appears to be that the evidence would support a rate of 6% (brief p. 117) and that the rate of 6½%, therefore, is a liberal return "upon a business which enjoys a virtual monopoly with no prospect of competition." The opinion of the trial court (R 1276) is cited as authority for the last statement.

The 6% return is based upon the testimony of Dr. Dozier, the economist of the Bureau of Animal Industry, Packers and Stockyards Division, who stated that the holder of common stock was entitled to the same return as a holder of the preferred stock of appellant (R 644). This is contrary to recognized and accepted principles. A senior security, with a guaranteed return, has a lower yield than a junior security such as a common stock. The truth of the matter is that the witness was hard put to justify his decrease from a rate of return of from 7½% to 8%, which he testified to be the reasonable rate in the 1930 hearing, to a rate *between* 6½% and 7% to which he testified in this hearing.

Dr. Dozier predicated his statement of the 1% drop in rate of return upon certain tables relative to the yield on Government bonds, public utility bonds and stocks, and industrial bonds and stocks (R 615-622). The yield on Government bonds has no pertinency on the question of the yield required to obtain public credit in a private industrial concern. It was pointed out in our first brief that the public utilities and industrial companies listed and considered by the witness were in no instances comparable to the appellant and this was admitted by the Government witness (R 640, 641). It would seem, therefore, that the testimony of Dr. Dozier that the rate of return had decreased from 1930 to 1934 "about one per cent" is a conclusion or opinion of the witness, predicated upon dissimilar facts and tables. His testimony on cross-examination, showed that even his tables did not justify his conclusion. He testified that of the public utility bond issues listed by him, 25% yielded to the investor in 1934 more than 6%, while in 1930 there were only 2.4% of such issues

having a 6% yield. In industrials, 33-1/3% of the issues yielded over 6% to the investor in 1934 against 7½% of such issues with a like yield in 1929. Having introduced the figures on direct examination and stated that he considered them, he admitted on cross-examination that there were more high yield industrials in 1934 than in 1929 and 1930 (R 638, 639). These tables, therefore, do not indicate a 1% drop in the rate of return.

As to common stocks, when the tables are analyzed, the same situation is portrayed (R 647). He further testified that his tables showed a higher average cost of capital in 1934 than in 1929 and admitted this did not indicate a decrease in the rate of return to investors (R 653).

In spite of this testimony, the witness stated that in his opinion the fair and reasonable rate for four or five years in the future would be a rate which would give an annual average return from 6½% to 7% (R 613, 614). He testified that below 6½% the rate would be outside the zone of reasonableness (R 651). By stipulation of the Government (R 354-362) as well as by admissions in the brief (p. 116) it is established that the average return which would have resulted from the application of the Secretary's rates during the two years immediately following the hearing, is 6.42%, even with the stock show properties eliminated and the show income included. Not only is this below the lowest bracket of the "zone of reasonableness" as testified to by any witness, but also it is lower than the rate of return fixed by the Secretary at the Omaha, St. Joseph and Sioux City markets, and agreed to at the Cleveland market. We submit that if the Secretary's findings

must be grounded upon evidence of record, then this finding and this rate of return is arbitrary, unreasonable and confiscatory.

The statement of the trial court, cited by counsel, that appellant enjoys a "monopoly with no prospect of competition" was not made a part of the Findings of Fact, nor could it properly be made a part thereof. It is not supported by the evidence.

Dr. Dozier, the Government witness on the subject, testified (R 653-655) that appellant had no franchise and that no certificate of convenience or necessity is required before a new stock yard could be started, that the shipper has complete freedom of choice as to the market to which he will ship his livestock and that appellant is in competition with nine other central markets (R 663). Mr. Pexton, assistant general manager of appellant, testified that the Denver market is in competition with auction sale rings which have sprung up all over the territory, the competition of which is increasing (R 816); that it is in constant competition with direct buying, which is likewise increasing (R 816, 817) and that all of these factors demonstrate that Denver has no monopoly (R 817, 1035, 1036). Dr. Dozier testified in the 1930 hearing that Denver was in the most competitive position of the ten central markets with the exception of the St. Joseph market, and Mr. Pexton testified that the same is true today (R 1036).

In spite of this testimony in the record, the trial court, in its opinion (R 1276) said "We take *judicial notice* that the plaintiff enjoys a monopoly with no

prospect of competition." Manifestly, this is erroneous. A court cannot take judicial notice of a proposition which is contrary to fact. This error undoubtedly colored the court's finding supporting the Secretary's rate, just as it now forms the basis of the Government's argument on this point. Where there is a grant of a monopolistic franchise, a lower rate of return is proper due to the sovereign's guarantee of freedom from competition in the same industry. We mean by this that although a light and power company may have to compete with coal in a particular community, the franchise protects it from competition in the same community with another light and power company. The protection and lessened competitive hazard warrants a lower service cost to the sovereign people from whom, through their representatives, the franchise was received. That is the basis for counsel's argument (brief p. 120) that "the return of 6½% is . . . . a liberal return on a business such as appellant's which enjoys a virtual monopoly with no prospect of competition." The error in the statement is that *appellant's business is not of that sort,* as demonstrated by the record. The argument therefore falls.

Far from being liberal, we submit that the schedule of rates does not even return the average rate of 6½% and that the findings fixing and upholding this rate and rate schedule are confiscatory.

CONCLUSION

For the reasons stated herein, and in appellant's first brief, we submit that the judgment of the trial court should be reversed and the enforcement of the Order of the Secretary of Agriculture of February 17, 1937, should be permanently enjoined.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 798.

THE DENVER UNION STOCK YARD COMPANY, *Appellant*,

v.

THE UNITED STATES OF AMERICA AND SECRETARY OF AGRICULTURE, *Appellees*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

SUPPLEMENTAL MEMORANDUM OF APPELLANT.

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SUPPLEMENTAL MEMORANDUM OF APPELLANT.

Appellant asks leave of the Court to file this supplemental memorandum, due to the effect upon this case and certain of the issues herein of the decision of this Court entered yesterday, April 25, 1938, in case No. 581, entitled *Fred O. Morgan, et al.*, v. *The United States of America and the Secretary of Agriculture.*

The points to be now raised are not covered by the briefs on file in this case, the appellant feeling itself barred from raising them by its interpretation of the decisions of this Court in *Acker* v. *The United States*, 298 U. S. 426 and *Morgan* v. *The United States*, 298 U. S. 468. In the *Acker case* there were no proposed findings, and in the decision of this Court in the *Morgan case* just referred to (298 U. S.

468) it was stated that while the filing of proposed reports was good practice, this Court could not say that it was essential to the validity of the proceeding. Accordingly, while the points here raised were presented to the trial Court and overruled by it (R-1255), no argument thereon is contained in either the original brief or the reply brief of appellant. The matters are, however, covered by assignments of error (R-1277, Assignments Nos. 6, 7, 10, and 16).

Each of the points to be briefly presented herein involve the fact that while the Secretary in this case did file proposed findings (R-22 *et seq*) those findings were changed adversely to appellant in the final findings and order in essential particulars although no exceptions were taken by appellant against those particular findings. This the appellant asserted and now asserts was arbitrary action on the part of the Secretary. The two findings referred to relate to condition percent (R-97, Finding 123) and rate of return (R-115, Finding 156).

There was one further finding, namely that involving the valuation of land, where the Secretary still further reduced the value of the used and useful land below that found and stated in the proposed findings (R-77, 79, 88, Proposed finding 93, 97, 113; R-285, 287, 296, Final findings 93, 97, 113). In the case of land valuation, however, appellant had excepted to the proposed findings on the ground that the entire land valuation figure was too low and not supported by the evidence. As stated above the Secretary further reduced the land value.

With regard to condition per cent, the unexcepted to proposed finding was 84 per cent. The Secretary reduced this to 80.545 per cent, resulting in a reduction of the structural value in the rate base of approximately $80,000. In the rate of return, the proposed finding was 6¾ per cent, which the Secretary reduced to 6½ per cent, resulting in a reduction in the annual fair return of $14,225.00, or equal to over $200,000.00 of rate base value.

With regard to the land valuation, the amount of the further reduction by the Secretary from the valuation stated in the proposed findings was $500.00 per acre in zone 1, $1,000.00 per acre in zone 2, and $754.00 per acre in zone 9, or a total reduction of $42,181.00 below the valuations of the proposed report.

We submit that if, as stated in the *Morgan case* No. 581, (decided April 25th 1938) it is arbitrary and a denial of due process for the administrative tribunal not to prepare and tender proposed findings it is equally arbitrary to change proposed findings adversely to the appellant where the proposed findings were not excepted to but, on the contrary, were accepted by the utility. Unless this be the fact it is useless to file proposed findings. Likewise, unless this be the fact, and a litigant be safe in relying upon the proposition that an unexcepted to proposed finding will be entered as part of the final order he is not safe in doing otherwise than filing exceptions to the proposed findings in their entirety, whether or not they are acceptable to him.

Suppose, further, that to avoid further litigation, or for any other reason, appellant had elected to accept *in toto* the proposed report. Any other rule than that which we have stated above, and which is now given sanction by the decision of this Court in the *Morgan case, supra,* would permit the Secretary to enter a final order totally different from that proposed and accepted. As a matter of fact, under the procedure of the Secretary of changing unexcepted to findings, appellant has lost over $280,000.00 of rate base value in lowered per cent condition and lowered rate of return. The reason why there is only $14,225.00 of difference between the fair return as proposed and the fair return as finally fixed by the Secretary is that appellant, at the oral argument, presented proof of the expenditure since the hearing of $22,500.00 for a bridge and $24,000.00 for a sewage disposal plant required by city ordinance, and these were included in the Secretary's final order, while not, of necessity, included in the proposed report.

As stated in the *Morgan case* (Case 581, page 5):

> Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

Again at page 6 of the opinion:

> The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps.

At the conclusion of the hearing before the Examiner, the fair and cooperative attitude of The Denver Union Stock Yard Company, appellant herein, was recognized by Government Counsel and made a part of the official record at page 1221.

This spirit of fair play, however, was not continued by the Secretary. We submit that it was arbitrary in the extreme to change the proposed findings as to per cent condition and rate of return adversely to appellant after their acceptance by appellant. The cogent reasons contained in the proposed report on the value of land in Zones 1, 2 and 9 were brushed aside in the final report. We submit that these changes under the circumstances of this case, constitute a denial of due process, justifying the setting aside of the Secretary's order.

Respectfully submitted,

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